

**BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2020-263-E**

**In Re:**

**Cherokee County Cogeneration  
Partners, LLC,**

**Complainant/Petitioner,**

**v.**

**Duke Energy Carolinas, LLC, and  
Duke Energy Progress, LLC,**

**Defendants/Respondents.**

**DUKE ENERGY CAROLINAS, LLC'S  
AND DUKE ENERGY PROGRESS,  
LLC'S ANSWER TO COMPLAINT**

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Pursuant to the Notice issued by the Public Service Commission of South Carolina (“Commission”) on November 19, 2020, and S.C. Code Regs. 103-826, and other applicable South Carolina law, Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP,” and together with DEC, the “Companies” or “Duke”) hereby answer the Complaint of Cherokee County Cogeneration Partners, LLC (“Complainant” or “Cherokee”) and respond as follows:

**SUMMARY OF ANSWER AND DEFENSES**

Complainant is an 89-MW cogeneration facility located in Gaffney, South Carolina that has the right under federal law, Section 210 of the Public Utility Regulatory Policies Act of 1978 (“PURPA”) 16 U.S.C. § 824(b), to obligate DEC, as the directly interconnected utility, or DEP, if Cherokee elects to transmit its power to DEP, to purchase its power.<sup>1</sup> DEC is currently purchasing the output of Complainant’s cogeneration facility (the “Cherokee Facility”) under a power purchase agreement (“PPA”) executed in 2012 pursuant to PURPA, which terminates on

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<sup>1</sup> See 18 C.F.R. 2929.303(a).

December 31, 2020 (the “2012 PPA”). Contrary to the allegations presented in the Complaint, the Companies have fully complied with their respective obligations under PURPA and continue to be ready and willing to negotiate in good faith and to enter into a new PURPA-compliant PPA with Complainant.

Under PURPA, “[e]ach electric utility is required . . . to offer to purchase available electric energy from cogeneration and small power production facilities which obtain qualifying status. . . [and] to pay rates which are just and reasonable to the ratepayers of the utility, in the public interest, and which do not discriminate against cogenerators or small power producers.”<sup>2</sup> PURPA provides that rates for such purchases from cogenerators and small power producers (“qualifying facilities” or “QFs”) may not exceed “the incremental cost to the electric utility of alternative electric energy,” which is “the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.”<sup>3</sup> FERC’s regulations term this cost the utility’s “avoided cost” and are explicit that utilities and their customers shall not be obligated to pay more than their avoided costs for purchases from QFs.<sup>4</sup>

Under this Commission’s implementation of PURPA in South Carolina, the Companies have long been required to engage in good faith negotiations with owners of large QFs, like Complainant, that are not eligible for the Companies’ standard offer avoided cost rates and to offer Large QFs rates for purchases of their output that meets PURPA’s avoided cost requirements. Beginning with South Carolina’s initial implementation of PURPA in Order No. 81-214, the Commission set the framework for utilities and small QFs to enter into standard rates, terms, and

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<sup>2</sup> See *Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,215 (1980) (“Order No. 69”); 16 U.S.C. § 824a-3(b).

<sup>3</sup> 16 U.S.C. § 824a-3(b), (d).

<sup>4</sup> 18 C.F.R. § 292.304(a)(2).

conditions specifically approved by the Commission, while directing the Companies to engage in good faith negotiations with larger QF projects and to offer rates for purchases that meet PURPA's avoided cost requirements.<sup>5</sup> Most recently, in response to the 2019 South Carolina Energy Freedom Act ("Act 62"), the Commission's PURPA implementation orders for Duke, Order No. 2019-881(A) and Order No. 2020-315(A), reiterated the Companies' responsibility to negotiate in good faith with larger QFs, while also establishing a Commission-approved methodology for calculating the Companies' avoided costs as well as approving a Large QF form PPA to be offered to all eligible small power producer QFs, as required by Act 62.<sup>6</sup> Order No. 2020-315(A) specifically directed the Companies to routinely update their avoided energy and capacity cost inputs for Large QFs based upon each utility's most current integrated resource planning assumptions, while also providing that "QFs are free to enter into negotiated PPAs with Duke that reflect alternative rate structures and terms that differ from what the Commission has approved here, so long as the rates agreed to do not exceed the utility's actual avoided cost."<sup>7</sup>

Contrary to the allegations of the Complaint, the Companies have met their obligations under PURPA and the Commission's orders implementing PURPA by offering in good faith to purchase power from Complainant at the Companies' respective avoided capacity and energy costs, calculated based on the methodology approved by the Commission. The challenge to

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<sup>5</sup> See Order Nos. 81-214 at p. 9 (Mar. 20, 1981) (recognizing "the substantial flexibility of negotiation which is reserved to each contracting party under part 292.301(b)"); see also 85-347 at pp. 20-21 (Aug. 2, 1985) ("The Commission urges voluntary negotiations of long-term contracts"); 85-770 at pp. 4-5 (Sept. 5, 1985) (denying petition for reconsideration and rehearing of Order No. 85-347 and explaining that "[t]he questions of unfairness and financial difficulties are a matter of point of view, needs of the individual QF, needs of the utility, and the needs of the ratepayers. Good faith negotiations should resolve these issues."); 89-56 at p. 9 (Feb. 8, 1989) (continuing to decline to mandate long-term rates as part of the standard PURPA contract and encouraging negotiation).

<sup>6</sup> S.C. Code Ann. § 58-41-20(A); Amended Order Approving Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Standard Offer Tariffs, Avoided Cost Methodologies, Form Power Purchase Agreements, and Commitment to Sell Forms, Order No. 2019-881(A), Docket Nos. 2019-185-E and 2019-186-E (Jan. 2, 2020); Order on Rehearing and Reconsideration, Order No. 2020-315(A) Docket Nos. 2019-185-E and 2019-186-E (April 17, 2020).

<sup>7</sup> Order No. 2020-315(A), at p. 19-23.

executing a new PPA with Complainant has been the significant decline in the Companies' avoided capacity and energy costs, compared to when the current PPA between DEC and Complainant was executed in 2012,<sup>8</sup> and Complainant has been unwilling to execute a new PPA with either DEC or DEP based upon the utility's actual avoided costs.

Since September 2018, Complainant has repeatedly requested DEC and DEP to provide their most current avoided costs and to enter into a new PPA to commence January 1, 2021. Each time, the Companies have responded in writing, providing their current avoided costs and providing a form Large QF PPA for Cherokee's review. And each time in response, Complainant has elected not to execute a new PPA. Instead, Complainant has requested to sell power to DEC or DEP at rates that are well above the Companies' avoided costs. The Companies have each time declined those offers as inconsistent with PURPA's avoided cost standard.<sup>9</sup>

In mid-September 2020, DEC offered Complainant a new PURPA-compliant proposal as part of DEC's continuing good faith efforts to negotiate a new PPA with Complainant and recognizing the Commission's recent guidance in Order No. 2020-315(A) that alternative rate structures and terms could be appropriate, so long as the rates agreed to do not exceed the utility's actual avoided cost.<sup>10</sup> Specifically, DEC offered Complainant an alternative PURPA PPA structure more similar to the current 2012 PPA structure, and offered a 10-year term, where the term of the 2012 PPA was 7.5 years. However, Complainant rejected that offer and again made a counter-offer that is well above DEC's avoided costs.<sup>11</sup> Complainant then followed its rejection of Duke's latest PURPA-compliant PPA proposal by filing this Complaint.

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<sup>8</sup> The Commission accepted the current Cherokee PPA in Order No. 2012-743 for a 7.5 year term extending through December 31, 2020 ("2012 PPA").

<sup>9</sup> The Companies' Late Filed Exhibit 2 to December 10, 2020 Oral Argument ("Late Filed Exhibit 2"), as filed December 15, 2020, provides the Commission a detailed timeline as well as extensive documentation supporting the Companies' good faith efforts to be responsive to Complainant's request to negotiate a new PPA.

<sup>10</sup> Order No. 2020-315(A), at p. 19-23.

<sup>11</sup> See Late Filed Exhibit 2, at 3, Attachment 18 and Attachment 19.

Complainant's allegations that the Companies have failed to provide avoided costs that are an accurate representation of their avoided costs is false. The evidence in this case will show that Duke has followed a consistent and standardized approach to developing its avoided cost rates based upon the methodology approved by the Commission, including routinely updating those avoided cost rates based upon changes in DEC's and DEP's future avoidable capacity needs and energy costs.

Complainant's allegations regarding Duke not responding or "delaying negotiations" and allegedly not providing supporting detail and explanations for the methodology used to calculate its avoided costs are also false. Complainant's unsupported hyperbole about "months of silence" from Duke and an unwillingness to negotiate in good faith to meet its PURPA obligations are not supported by the facts. The Companies' Late-Filed Exhibit 2 details the negotiations between the parties and demonstrates the Companies' consistent responsiveness and good faith efforts to negotiate a PURPA-compliant successor PPA with Complainant.

Moreover, Complainant's allegations regarding improper imposition of "transmission rights" are equally unfounded. Under PURPA, where a QF desires to sell its output to a utility to which it is not directly interconnected (which is the scenario with Cherokee expressing interest in selling its power to DEP), the QF must transmit and deliver its output to the "other utility."<sup>12</sup> This means that the QF is responsible for arranging transmission service to deliver its output to the other utility.<sup>13</sup> There is no basis under PURPA for DEP customers to be obligated to both pay for the transmission to deliver Cherokee's power from DEC to DEP's system as well as to pay Cherokee its avoided costs. Complainant has the right to either sell its power to DEC, as it has done for the

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<sup>12</sup> See *Kootenai Elec. Coop., Inc.*, 143 FERC ¶ 61, 232 (2013); *Patu Wind Farm, LLC*, 151 FERC ¶ 61,223 (2015).

<sup>13</sup> *Id.*

past 22 years, at DEC's avoided costs, or to arrange to deliver its power to DEP in order to be paid DEP's avoided costs. That is all that PURPA requires.<sup>14</sup>

In sum, since 2018, DEC and DEP have negotiated in good faith with Complainant— as they have with dozens of other QFs seeking to sell their output to DEC or DEP under PURPA— and have provided Complainant with avoided cost rates and form PPAs that are fully consistent with PURPA's requirements and this Commission's implementation of PURPA. DEC also remains ready to negotiate with Complainant regarding a new PURPA-compliant PPA either in the form approved by the Commission for small power producer QFs or under an alternative arrangement similar to the existing 2012 PPA, as DEC offered to Complainant in September 2020. For the foregoing reasons, as further addressed in this Answer, the Companies respectfully request that the Commission dismiss the Complaint.

## **ANSWER**

### **RESPONSE TO COMPLAINANT'S ALLEGATIONS**

1. The Companies deny each and every allegation of the Complaint except as hereinafter admitted. The Companies answer the allegations in the Complaint identified by paragraph numbers or named sections corresponding to those in the Complaint.

2. The Companies admit the allegation contained in numbered paragraph 1 upon information and belief.

3. Numbered paragraph 2 is procedural and informational in nature and does not require a response.

4. Answering the allegations of numbered paragraph 3, DEC and DEP admit the allegations. DEC and DEP are South Carolina public utilities under the laws of South Carolina

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<sup>14</sup> See 18 C.F.R. 292.303(a); (d).

and are subject to the jurisdiction of the Commission with respect to their operations in this State.

5. Answering the allegations of numbered paragraph 4, the Companies admit that the Commission has jurisdiction over the subject matter of the Complaint as it relates to South Carolina's implementation of PURPA. The Companies deny that the Commission has jurisdiction over any other subject matter addressed in the Complaint, including, but not limited to, transmission service under the Companies' Open Access Transmission Tariff ("OATT") and establishing or reviewing rates for wholesale sales or purchases of power outside of PURPA and rates, terms and conditions of transmission service. *See* 16 U.S.C. § 824(b).

6. Answering the allegations of numbered paragraph 5, the Companies admit that the Commission is a State regulatory authority responsible for overseeing the administration of PURPA for DEC and DEP in South Carolina, subject to and consistent with FERC's regulations implementing PURPA and South Carolina law. *See* 16 U.S.C. § 824a-3(f); 18 C.F.R. § 292; S.C. Code Ann. § 58-41-05, *et seq.*

7. Answering the allegations of numbered paragraph 6, the Companies admit that DEC and DEP jointly dispatch the generation resources of DEC and DEP, pursuant to the Joint Dispatch Agreement as authorized by FERC and the Commission.<sup>15</sup> However, the Companies deny the allegation that DEC and DEP plan or operate a "collective system," as alleged in the Complaint, and submit that such joint activities are expressly prohibited by the Companies' Regulatory Conditions.<sup>16</sup> The Companies further deny the implicit allegation in this paragraph that the Joint Dispatch Agreement affects DEC's and DEP's obligations as "electric utilities" under

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<sup>15</sup> Order No. 2012-517 (July 11, 2012).

<sup>16</sup> *See* Regulatory Condition 3.9 (b) and 4.1. The North Carolina Regulatory Conditions were approved by the North Carolina Utilities Commission in its September 29, 2016 Order Approving Merger Subject to Regulatory Conditions and Code of Conduct, in Docket Nos. E-2, Sub 1095, E-7, Sub 1100 and G-9, Sub 682. It was further adopted, as applicable to South Carolina, via the Public Service Commission of South Carolina's Order No. 2016-772 dated November 2, 2016, and as updated in a filing made on October 9, 2018.

PURPA and “electrical utilities” under South Carolina law to separately and independently quantify their avoided costs and to meet their mandatory purchase obligation requirements. *See* 16 U.S.C. § 824a-3(b)-(c); S.C. Code Ann. § 58-41-10(4).

8. Answering the allegations of numbered paragraph 7, the Companies reply to the allegations as follows:

a. Upon information and belief, the Companies admit that Cherokee owns and operates an 89 MW natural gas-fired combined cycle generating facility located in Gaffney, SC. Upon information and belief, the Companies admit that the Cherokee Facility is a cogeneration facility providing steam to an industrial facility. Upon information and belief, the Companies admit that Complainant has self-certified as a QF with FERC.

b. DEC admits that Complainant has provided energy and capacity to DEC for the past 22 years as a QF, and that Complainant and DEC are parties to the 2012 PPA, as accepted for filing by the Commission in Order No. 2012-743 in Docket No. 2012-272-E. The Companies admit that under the current 2012 PPA, DEC has rights to dispatch the Cherokee Facility, and that, as part of the payment structure under the 2012 PPA, DEC pays, in part, a fixed monthly capacity payment to Complainant. The Companies deny that such payment structure is consistent with the manner in which DEC or DEP recovers costs for DEC-owned or DEP-owned generating facilities.

c. DEC and DEP further deny that Cherokee established a legally enforceable obligation as that term is used under FERC’s regulations, 18 C.F.R. 292.304(d)(2), with either utility in 2018. The Companies further address this allegation in responding to the allegations of numbered paragraph 9. The Companies are without sufficient information to admit or deny whether Cherokee is capable of delivering energy and capacity to DEP.

9. Answering the allegations of numbered paragraph 8, the provisions of S.C. Code Ann. § 58-37-40 speak for themselves. The Companies admit that DEC and DEP have each met the requirements of Act 62 and submitted an integrated resource plan (“IRP”) for Commission review and approval. The Companies admit that the Commission has approved the Companies’ avoided cost rates and methodology for calculating avoided costs for QFs in Order No. 2019-881(A) and Order No. 2020-315(A). The Companies further admit that DEC’s and DEP’s current avoided cost rates approved by the Commission include levelized energy and capacity components for a contract term of ten years. However, the Companies deny that the Commission found that DEC or DEP have an immediate capacity need, instead determining that “DEC and DEP have appropriately identified their first avoidable capacity needs, as presented in their 2019 IRP Updates.” Order No. 2019-881(A), at 89. The Commission further directed the Companies to “routinely update its inputs for both avoided energy and avoided capacity costs based upon each Company’s most current integrated resource planning assumptions and forecasts when calculating avoided energy and capacity cost rates available to Large QFs.” *Id.* at 19. As presented in their 2020 IRPs, DEC’s first avoidable undesignated capacity need occurs in 2026 while DEP’s first avoidable undesignated capacity need occurs in 2024.

10. Answering the allegations of numbered paragraph 9, the Companies admit that Section 210 of PURPA, 16 U.S.C. § 824a-3, and FERC’s implementing regulations, 18 C.F.R. § 292.303(a), impose a mandatory purchase obligation on DEC to purchase the output from the Cherokee Facility, and further that 18 C.F.R. § 292.303(d) establishes a process for an electrical utility not directly interconnected to a QF, such as DEP in this instance, to become obligated to purchase the QF’s energy or capacity output where the QF arranges to transmit its energy and capacity to the other electrical utility. The Companies admit that Section 292.304(d)(1) of FERC’s

regulations allows a QF to choose to sell energy “as available,” in which case rates for purchases are based on the utility’s avoided costs calculated at the time of delivery, and that Section 292.304(d)(2) allows a QF to choose to sell energy or capacity pursuant to a legally enforceable obligation (“LEO”), with rates for purchases based either on avoided costs calculated at the time of delivery, Section 292.304(d)(2)(i), or at the time the obligation is incurred, Section 292.304(d)(2)(ii).

The Companies deny that Complainant established a legally enforceable obligation with DEC or DEP in 2018. First, as it relates to DEC, Complainant’s actions of sending a letter in September 2018 notifying DEC of Cherokee’s intent to negotiate a new PPA with DEC and sending a small QF notice of commitment form, inapplicable to QFs larger than 2 MW, were legally insufficient to establish a legally enforceable obligation committing Cherokee to deliver its energy and capacity to DEC for a specified future term. Complainant’s identical actions in December 2018 as they relate to DEP were equally insufficient to establish a legally enforceable obligation committing Cherokee to deliver its energy and capacity to DEP for a specified future term. Contrary to the allegations in paragraph 9, Cherokee has expressly chosen not to enter into a legally enforceable obligation to sell its output to DEC or DEP, refusing to execute any of the PURPA-compliant PPAs that DEC and DEP have each provided for Cherokee’s signature, based on each utility’s then-available avoided costs. Moreover, Cherokee’s assertion in December 2018 that it was also establishing a legally enforceable obligation to transmit and deliver its power to DEP, after it had previously purported to establish a legally enforceable obligation to sell its output to DEC, demonstrates that Cherokee never legally committed itself in any enforceable way to sell its power to either utility over a future specified term.

DEC and DEP have each offered their avoided cost rates and form PURPA PPAs to Cherokee, as required by the Commission's prior orders directing good faith negotiations between electrical utilities and QFs; however, Cherokee has refused to execute a new PPA obligating itself to sell and deliver power to either DEC or DEP for a future specified term, as contemplated by 18 C.F.R. 292.304(d)(2).

11. Answering the allegations of numbered paragraph 10, the Companies respond as follows:

a. The Companies admit that 18 C.F.R. 292.303(d) establishes a process for QFs and utilities to agree for the utility to transmit the QF's energy and capacity to any other electric utility. Consistent with 18 CFR 292.303(d) and FERC's orders interpreting PURPA, DEC informed Complainant that any transmission arrangements necessary to deliver Complainant's output to another utility under PURPA would be the responsibility of Complainant. To the Companies' knowledge, Cherokee has not submitted any request for transmission service under the Companies' FERC-jurisdictional OATT. Transmission service within DEC's and DEP's transmission system is governed by the Companies' OATT and subject to the jurisdiction of FERC.

b. The Companies further deny Complainant's allegation that "Duke has told Cherokee that if Cherokee enters into a negotiated agreement then Duke will treat Cherokee as a "network resource." In August 2018, at DEP's invitation, Cherokee elected to bid into DEP's 2018 non-PURPA Capacity and Energy Market Solicitation ("DEP 2018 Capacity Solicitation")<sup>17</sup> to meet DEP's forecasted reliability needs for approximately 2,000 megawatts (MW) of capacity. As described in the DEP 2018 Capacity Solicitation, winning bidders must be eligible to be designated as a network resource pursuant to the Companies' OATT to ensure that the generating

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<sup>17</sup> See Late Filed Exhibit 2, at Attachment 1.

facility was fully capable of delivering its power into the DEP system when called upon. Cherokee was not a successful bidder in the DEP 2018 Capacity Solicitation, and there is currently no open DEP or DEC non-PURPA purchased power solicitation.

c. The Companies deny that DEC or DEP has chosen to “impose” any “transmission requirement” on Complainant or intends to “discriminate” against Cherokee. Instead, in meeting their obligations to offer to purchase Cherokee’s power under PURPA, the Companies have advised Complainant that Cherokee will be responsible for the cost of transmission service to deliver power to DEP if it desires not to sell to DEC and to force DEP to purchase its power under PURPA (presumably to obtain the advantage of higher avoided cost rates). Moreover, the Companies deny that requiring a QF that desires to sell its output to another utility to obtain and pay for transmission service in any way is discriminatory or violates any federal or state law or demonstrates any purported “monopoly control.”

12. In answering the allegations of numbered paragraph 11, the Companies admit that Cherokee submitted a term sheet proposal to DEC in 2018, offering to provide energy and capacity from the Cherokee Facility to DEC. The Companies deny that the rates offered in the term sheet were below DEC’s avoided costs.

13. In answering the allegations of numbered paragraph 12, the Companies admit that Cherokee submitted an executed small QF notice of commitment to sell form (applicable at the time to QFs 2 MW or less) to DEC on September 17, 2018. The Companies deny that such notice constituted a LEO for reasons addressed in the Companies’ response to Paragraph 9. DEC denies that Cherokee’s September 17, 2018 letter providing notice of Cherokee’s intent to establish a legally enforceable obligation and enter into a successor PPA made any reference to “having the total output of energy and capacity from its facility apportioned between DEC and DEP” or that

such an arrangement would be compliant with DEC's mandatory purchase obligation under PURPA.

14. In answering the allegations of numbered paragraph 13, the Companies admit that Cherokee submitted an executed small QF notice of commitment to sell form (applicable at the time to QFs 2 MW or less) to DEP on December 12, 2018. The Companies deny that such letter and notice constituted a LEO for reasons addressed in the Companies' response to Paragraph 9.

15. The Companies admit the allegations of numbered paragraph 14.

16. In answering the allegations of numbered paragraph 15, the Companies deny that DEC and DEP have failed to negotiate terms with Cherokee in a good faith and non-discriminatory manner. The Companies deny that they have failed to provide the requested support showing that the rates proposed by Duke reflect the Companies' avoided costs, as the Companies responded to Cherokee's April 30, 2019 and May 4, 2020 letters in letters dated June 14, 2019 and June 24, 2020, respectively, and provided supplemental information on August 20, 2020.<sup>18</sup> The Companies further deny that they "failed to enter into discussions with Cherokee regarding proposed PPA terms provided by Cherokee to DEC on December 7, 2018, and to DEP on April 9, 2020," as the Companies declined these non-PURPA proposals in writing on December 21, 2018 and April 21, 2020, respectively.

17. In answering the allegations of numbered paragraph 16, the Companies deny that "months of silence" transpired in 2020 where the Companies were not responding to Cherokee. To the contrary, Cherokee did not contact the Companies between June 2019 and March 2020 regarding Cherokee's previously-asserted intent to enter into a new PPA to deliver power to either DEC or DEP. The Companies further deny that any aspects of the Commission-approved Large

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<sup>18</sup> See Late Filed Exhibit 2, at 3.

QF form PPA are unreasonable or otherwise do not comport with PURPA or any other applicable law or regulation. The Companies are without sufficient information to know whether the Companies' current avoided costs and Large QF form PPA are uneconomic for Cherokee, and specifically deny that such consideration is relevant in calculating avoided cost rates to be paid to QFs pursuant to PURPA.

18. In answering the allegations of numbered paragraph 17, the Companies respond as follows:

a. The Companies deny that they have failed to engage in good faith negotiations with Cherokee. The Companies deny that the avoided cost rates and Large QF form PPA offered to Cherokee are inconsistent with PURPA and the Commission's implementation of PURPA. To the contrary, DEP's avoided cost rates delivered to Cherokee were calculated consistent with the methodology approved by the Commission in Docket Nos. 2019-185-E and 2019-186-E and follow the Commission's directive to adhere to the Commission-approved methodology and to "use the consistent inputs (and in particular the same resource plan) for the calculation of energy and capacity rates for Large QFs." *See* Order No. 2020-315(A), at 23.

b. As to the "form and structure of the Proposed PPA" being "appropriate for an intermittent resource, such as a solar facility, but . . . inappropriate and unworkable for the Cherokee facility," DEP is without sufficient information to admit or deny whether DEP's avoided cost rate design and the Commission-approved Large QF form PPA is "unworkable" for Cherokee. However, the Companies admit that the Commission-approved Large QF form PPA is a different structure than the current 2012 PPA between DEC and Cherokee. The Companies deny, however, that it was "unreasonable and discriminatory" to offer Cherokee the Commission-approved Large QF form PPA. FERC's regulations and prior Commission orders provide that utilities and QFs

may negotiate rates and terms and conditions of PPAs, so long as they are fully compliant with the avoided cost framework under PURPA and filed with the Commission.<sup>19</sup> For that reason, on September 17, 2020, DEC offered to purchase Cherokee's output under a similar PPA structure as the 2012 PPA.

c. The Companies admit that DEC informed Cherokee that DEC would be willing to negotiate a new successor PPA based upon the form of the existing 2012 PPA, if preferred by Cherokee. DEC communicated this offer to Cherokee on September 17, 2020, and on September 23, 2020, Cherokee verbally rejected the offer and made a "counter-proposal," which was in excess of DEC's avoided cost. On September 25, 2020, Cherokee sent such counterproposal in writing to DEC, and on October 5, 2020, DEC notified Cherokee that the unsolicited offer was "well above DEC's avoided costs and is not an offer we can accept."<sup>20</sup> The Companies deny that the avoided cost rates proposed on September 17, 2020, were not reflective of DEC's actual avoided cost rates calculated pursuant to PURPA and the Commission's approved methodology.

19. Numbered paragraph 18 does not exist in the Complaint.

20. The allegations of numbered paragraph 19 are procedural in nature and require no response.

21. In answering the allegations of numbered paragraphs 20 and 21, the Companies deny that they have failed to negotiate in good faith with respect to the calculation of avoided cost rates and/or contract terms, to which Cherokee is entitled under PURPA and this Commission's orders implementing PURPA.

22. The allegations of numbered paragraph 22 are procedural in nature and require no response.

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<sup>19</sup> See footnote 5 *supra*.

<sup>20</sup> See Late Filed Exhibit 2, at Attachment 19.

23. In answering the allegations of numbered paragraph 23, the Companies admit that the parties have not entered into a new PPA as of the date of the Complaint and that the Commission has the authority to consider in a formal complaint proceeding whether the Companies have (and continue to) approach negotiations with Cherokee reasonably and in good faith.

24. In answering the allegations of numbered paragraph 24, the Companies respond as follows:

a. In answering Complainant's allegations in subpart (1), regarding Avoided Cost, the Companies deny that they have failed to negotiate transparently, and in good faith, with respect to payment to Cherokee of DEC's and DEP's respective avoided energy and avoided capacity rates, or that they have failed to support the calculation of such avoided energy and avoided capacity rates.

b. In answering Complainant's allegations in subpart (2), regarding Form of Contract, the Companies deny that the June 24, 2020 Commission-approved Large QF form PPA is the only form of contract that the Companies have offered to Cherokee. The Companies deny that the avoided cost rates associated with the June 24, 2020 proposed PPA or the more recently discussed form of dispatchable PPA are inconsistent with DEP's and DEC's actual avoided energy and avoided capacity rates, calculated based on the methodology approved by the Commission in Order Nos. 2019-881(A) and 2020-315(A). The Companies are without sufficient information to know whether DEC's avoided cost rates and the form of PPA are "non-compensatory and economically infeasible" for Cherokee, but specifically deny that such consideration is relevant in calculating DEC's or DEP's avoided cost rates to be paid to QFs pursuant to PURPA.

c. In answering Complainant's allegations in subpart (3), regarding Capacity Payments, the Companies reference their response to numbered paragraph 17, and specifically deny Complainant's allegations that the capacity payments offered to Cherokee do not reflect DEC's and DEP's future need for capacity over the next 10 years and a reasonable avoided cost rate design, which has been approved by the Commission. The Companies further note DEC's response to numbered paragraph 17, providing that DEC has offered to negotiate a new successor PPA based upon the structure of the 2012 PPA versus the form of Large QF PPA approved by the Commission.

d. In answering Complainant's allegations in subpart (4) Term of Contract, the Companies admit that they initially offered Cherokee a PPA with a five-year term. The Companies further admit that DEC's September 17, 2020 avoided cost rate proposal was offered based upon a ten-year term; however, Cherokee rejected the September 2020 offer. The Companies otherwise deny the allegations in subpart (4) of paragraph 24.

e. In answering Complainant's allegations in subpart (5) Joint Dispatch, the Companies deny that the proposed avoided cost rates and PPAs offered by the Companies do not account for DEC's and DEP's operations under Joint Dispatch Agreement, as the Companies' respective IRPs and avoided energy costs reflect actual forecasted system operations including DEC and DEP jointly dispatching generation as provided for under the Joint Dispatch Agreement. However, DEC and DEP continue to have separate and independent mandatory purchase obligations under PURPA and the Commission's orders implementing PURPA, and the Companies deny that Cherokee's purported proposal to sell partial output to DEC and DEP during differing periods of the year is consistent with PURPA.

f. In answering Complainant's allegations in subpart (6) No Carbon Pass-through, the Large QF form PPA speaks for itself and, to date, Cherokee has not raised any issues in negotiations with either DEC or DEP regarding Section 7.2. Duke otherwise denies the allegations in the Complaint as this provision of the Large QF form PPA is fully consistent with PURPA. To the extent Cherokee believes future carbon pricing may affect the Companies' avoided costs at some future point in time, Cherokee may elect to enter into a shorter-term contract or to price its power at the time of delivery versus executing a longer-term contract that reflects the Companies' known avoidable costs today, which does not include the cost of carbon dioxide allowances. It is well established that utilities are not obligated to pay QFs for costs that are not avoidable if the QF elects to fix its avoided cost rates at the outset of the PPA.<sup>21</sup>

WHEREFORE, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, having fully set forth their Answer, request that the Commission find that Complainant has failed to carry its burden of showing that the Companies have failed to meet their obligations under PURPA and grant such other relief as the Commission deems just and proper.

Dated this 21<sup>st</sup> day of December 2020.

Respectfully submitted,




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<sup>21</sup> See *Southern Cal. Ed.*, 71 FERC ¶ 61, 269, 62,080 (June 2, 1995) (discussing how a “state may not set avoided cost rates or otherwise adjust the bids of potential suppliers by imposing environmental adders or subtractors that are not based on real costs that would be incurred by utilities”).

and

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